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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1963

No. 442

LUCILE McAULAY FILIPPINI, as Executrix of the Last Will and Testament of Carra McAulay, Deceased,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

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Subject Index

Page

1. Respondent asserts that the issue presented herein is no longer important. But this is directly contrary to the irrefutable fact that on our precise issue the basic question has reached the lower federal appellate courts no less than seven times in the last five years, with divergent results, and that many more must be on the way. Moreover, the 1958 amendment does not apply to some cases of corporations, residences, stock in trade or property held for sale 1

2. Respondent may mislead the court in its erroneous contention, unsupported by the record, that the converted and replacement properties in the instant case were not of the same "general class" 4

3. Respondent has failed to answer the remaining points made in our petition for certiorari 6

Conclusion 6

Table of Authorities Cited

	Pages
Ben Pohn, 20 CCH Tax Ct. Mem. 1632 (1961)	3
Capitol Motor Car Co. v. Commissioner, 314 F. 2d 469 (6th Cir. 1963)	1
CCH Dec. 25,977(M)	3
Clifton Investment Co. v. Commissioner, 312 F. 2d 719 (6th Cir. 1963)	1, 2, 3
Filippini v. United States, 200 F. Supp. 286 (N.D. Cal. 1961)	2
Liant Record, Inc. v. Commissioner, 303 F. 2d 326 (2d Cir. 1962)	2
Loco Realty v. Commissioner, 306 F. 2d 207 (8th Cir. 1962)	2, 3
McCaffrey Bros. v. Commissioner, 275 F. 2d 27 (3d Cir. 1960)	2
Pohn v. Commissioner, 309 F. 2d 427 (7th Cir. 1962)	2, 5
Stuart Bros., Inc. v. Commissioner, 261 F. 2d 580 (4th Cir. 1958)	2

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PETITIONER'S REPLY BRIEF

This will reply to Respondent's Brief in opposition:

1. RESPONDENT ASSERTS THAT THE ISSUE PRESENTED HEREIN IS NO LONGER IMPORTANT BUT THIS IS DIRECTLY CONTRARY TO THE IRREFUTABLE FACT THAT ON OUR PRECISE ISSUE THE BASIC QUESTION HAS REACHED THE LOWER FEDERAL APPELLATE COURTS NO LESS THAN SEVEN TIMES IN THE LAST FIVE YEARS, WITH DIVERGENT RESULTS, AND THAT MANY MORE MUST BE ON THE WAY. MOREOVER, THE 1958 AMENDMENT DOES NOT APPLY TO SOME CASES OF CORPORATIONS, RESIDENCES, STOCK IN TRADE OR PROPERTY HELD FOR SALE.

See Capitol Motor Car Co. v. Commissioner, 314 F. 2d 469 (6th Cir. 1963); *Clifton Investment Co. v.*

Commissioner, 312 F. 2d 719 (6th Cir. 1963); *Liant Record, Inc. v. Commissioner*, 303 F. 2d 326 (2d Cir. 1962); *Loco Realty v. Commissioner*, 306 F. 2d 207 (8th Cir. 1962); *Pohn v. Commissioner*, 309 F. 2d 427 (7th Cir. 1962). Adding the *Stewart* case decided in 1958 and *McCaffrey* decided in 1960, we have SEVEN DIVERGENT DECISIONS.

Six recent federal cases under section 1033(a), relating to the replacement of investment property before section 1033(g) became effective in 1958, have created questions as to the scope of similiar or related inservice or use as to investment property, i.e., rental property; and the courts actually have taken FOUR DIFFERENT APPROACHES.

The first break from functional use is found in *Stuart Bros., Inc. v. Commissioner*, 261 F. 2d 580 (4th Cir. 1958).

The Tax Court declined to follow this shift and found support in *McCaffrey Bros. v. Commissioner*, 275 F. 2d 27 (3d Cir. 1960), applying the functional use test in another case where both the old and new properties were held for investment (a leased parking lot replaced by a two-story warehouse).

McCaffrey was followed and *Stewart* diluted in our case of *Filippini v. United States*, 200 F. Supp. 286 (N.D. Cal. 1961).

The Tax Court continued its established pattern but was again reversed in *Liant Record, Inc. v. Commissioner*, 303 F. 2d 326 (2d Cir. 1962), on appeal from 36 T.C. 224 (1961). On remand of the *Liant* case the

Tax Court applied the relation to the taxpayer test as directed and found that the replacement property was similar or related. CCH Dec. 25,977(M).

On August 1, 1962, *Liant* was followed by *Loco Realty Co. v. Commissioner*, 306 F. 2d 207 (8th Cir. 1962), which usefully analyzes the prior cases. The Court held that there must be more similarity between the properties than investment status; coupled with this must also be a reasonable similarity in the leased premises themselves. Rental of premises for light manufacturing, replaced by rental to a wholesale grocer for use as office and warehouse, was sufficient.

In *Ben Polin*, 20 CCH Tax Ct. Mem. 1632 (1961), it was held that continuity of interest is crucial in determining whether replacement property is similar or related. The replacement of a rented filling station by rental apartments was approved, in accord with *Liant*.

On February 6, 1963, the Sixth Circuit adopted the *Liant* test but, nevertheless, held that a hotel was not similar or related to an office building that it replaced, although both properties were held for the production of income; what the hotel required in the way of management, service, and relationship to tenants varied considerably from what the office building required. *Clifton Investment Co. v. Commissioner*, 312 F. 2d 719 (6th Cir. 1963).

Moreover, while prior to 1958 the uniform rule was that replacement property had to be similar or related

in service or use to the converted property; that still is the federal and state rule today where the controlling stock (80 percent) in a corporation owning replacement property is purchased, or where under federal law the condemned property is a residence, stock in trade, or property held for sale.

There doubtless are many, many more cases pending at the administrative trial and appellate court levels involving the same issue. It desperately needs resolution by this court.

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2 **RESPONDENT MAY MISLEAD THE COURT IN ITS ERRONEOUS CONTENTION, UNSUPPORTED BY THE RECORD, THAT THE CONVERTED AND REPLACEMENT PROPERTIES IN THE INSTANT CASE WERE NOT OF THE SAME "GENERAL CLASS".**

Respondent in its Brief in Opposition falls into the same trap that misled the courts below. It is asserted that the trial court somehow found and the appellate court affirmed the fact that the converted property involved herein was a "rural agricultural tract" and the replacement property was a "commercial office building". (Brief in Opposition p. 5.) But, it was conceded and the trial court actually found that both properties were improved real estate (Petition, p. viii) and that the converted property was close to the city of Patterson where the replacement property was located. (*Ibid.*) As stated, (see Petition, p. 22) respondent cannot succeed in any distinction as to the

"general class" of taxpayer's properties based on a contention that one was "rural" and one was "urban". California agricultural ventures are commercial business operations. As the court found, commercial business enterprises were conducted by tenants on both properties. Taxpayer simply replaced rentals from one commercial real estate operation by rentals from the other commercial real estate operation. In any event the properties were substantially more in the "same general class" than a Chicago Filling Station and Florida Vacant real estate, held to satisfy the test in *Poha v. Commissioner*, 309 F. 2d 427 (7th Cir. 1962).

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3. **RESPONDENT HAS FAILED TO ANSWER THE REMAINING POINTS MADE IN OUR PETITION FOR CERTIORARI.**

Respondent represents to this court that all the recent cases concerning the issues before the court somehow are harmonious. The answer to this representation lies in a reading of the opinions themselves, as epitomized in our petition. It is manifest that there have been divergent results from similar factual situations.

Moreover, conflicting theories have been announced by the various courts, culminated by the novel theory of the court below.

And, in addition, even assuming the theory correct, petitioner was denied an opportunity to be heard and present evidence in compliance with such a theory.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be granted for all the reasons stated.

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